



ASIA PACIFIC  
TRANSGENDER  
NETWORK

Wannapong Yodmuang

Asia Pacific Transgender Network  
A Square Bangkok  
120/1, 2nd floor, Soi Sukhumvit 26,  
Khlong Tan, Khlong Toi, Bangkok 10110, Thailand  
hello@weareaptn.org +6620066670

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To: The Nepal Supreme Court

Regarding: Expert opinion on the case of Rukshana Kapali V. Government of Nepal  
et al. (Writ petition # 077-WO-0973).

I am the Senior Human Rights and Advocacy Officer at the Asia Pacific Transgender Network (APTN) with experience of research and advocacy for trans rights at the local, regional and global level. I also conducted APTN and UNDP's research project 'Legal Gender Recognition in Thailand: A Legal and Policy Review' in 2016-2018 and have academic background on the international human right law (LLM)

APTN is also trans-led regional organisation founded in 2009, that engages with a range of partners across Asia and the Pacific to support, organise, and advocate for fundamental human rights including legal gender recognition; access to justice and legal protections; and comprehensive gender-affirming healthcare and policies, for trans and gender diverse people. APTN works with in-country trans-led and trans-inclusive community groups/organisations in Southeast Asia, South Asia, the Pacific, and East Asia, including in Nepal

In this submission, please find:

1. The expert opinion by Wannapong Yodmuang

I hereby present the attached expert statement on the case (3 pages, 1054 words).

Sincerely,

Wannapong Yodmuang

Wannapong Yodmuang  
Senior Human Rights and Advocacy Officer  
Asia Pacific Transgender Network

STANDING UP FOR TRANS RIGHTS

A Square Bangkok, 120/1, 2nd Floor, Soi Sukhumvit 26  
Khlong Tan, Khlong Toei, Bangkok 10110, Thailand

T +66 2 006 6670

Wannapong Yodmuang

weareaptn.org



## Statement of issues

Ms. Rukshana Kapali, petitioner, has illustrated to the court the government's failure to recognise her as Female in the official documents resulted in the violation of fundamental human rights she has experienced, such as right to self-determination and right to education.

Ms. Kapali has described the incoherence and inconsistency of the legal gender recognition procedure in Nepal resulting in the discrepancies between her names and gender markers in the ID and educational records and documents. Due to the discrepancies, it is functionally impossible for Ms. Kapali to register for credit in university, or obtain the validated educational certificates, thus her full education is denied.

Meanwhile, the Supreme Court of Nepal ruled the government to establish legal gender recognition procedure on the basis of 'self-feeling', and 'Third Gender'<sup>1</sup> category in 2007, and some Nepali entities have implemented and marked the category in official documents as 'Third Gender', 'Other', or 'Sexual and Gender Minority'.<sup>2</sup> However, the procedures are deemed to provide no option for trans people to be legally recognised with a different binary gender than the one assigned at birth.

This is also highlighted as an human rights issue by United Nations Independent Expert on Sexual Orientation and Gender Identity in his 2018 report to the UN General Assembly:

*'In 2007, the Supreme Court of Nepal required that the Government recognize a third gender based on self-determination and without medical requirements.... It remains, however, focused solely on a third gender identity, with no option for trans women to be recognized as female or transmen to be recognized as male'*<sup>3</sup>

<sup>1</sup> International Commission of Jurists (n.d), Sunil Babu Pant and Others v. Nepal Government and Others, Supreme Court of Nepal, December 21, 2007.

<sup>2</sup> Kyle Knight, "What We Can Learn From Nepal's Inclusion of 'Third Gender' on Its 2011 Census," The New Republic, July 18, 2011, <https://newrepublic.com/article/92076/nepal-census-third-gender-lgbt-sunilpant>.

<sup>3</sup> UN General Assembly, Report of the independent expert on sexual orientation and gender identity, Protection against violence and discrimination based on sexual orientation and gender identity, A/73/152, July 12, 2018, <http://www.un.org/en/ga/search/viewdoc.asp?symbol=A/73/152>, Para 63.



This opinion document argues around the rights and self-determination based approaches to legal gender recognition.

### **Rights and self-determination based approaches to legal gender recognition**

The United Nations Independent Expert on Sexual Orientation and Gender Identity confirmed that the concept of legal gender recognition has been enshrined as the right to equal recognition before the law established in article 6 of the Universal Declaration of Human Rights (UDHR), and subsequently set out in international human rights law, beginning with article 16 of the International Covenant on Civil and Political Rights (ICCPR).<sup>4</sup> As Nepal ratified ICCPR in 1991, its government has the obligations under the ICCPR to ensure equality before the law and the equal protection of the law of all persons without discrimination on any ground, including sex (article 26)

The Independent Expert also emphasized the importance of self-determination principle, and obligation of States to provide access to gender recognition in a manner consistent with the rights to freedom from discrimination, equal protection of the law, privacy, identity and freedom of expression.<sup>5</sup>

Moreover, Principle 3 of the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, a set of principles developed by international human rights experts and endorsed by the UN Human Rights Council, states that

*'Everyone has the right to recognition everywhere as a person before the law. Persons of diverse sexual orientations and gender identities shall enjoy legal capacity in all aspects of life. Each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity, and freedom. No one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilization or hormonal therapy, as a requirement for legal recognition of their gender identity. No status, such as marriage or parenthood, may be invoked as such to prevent the legal recognition of a person's gender identity.'*

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<sup>4</sup> Ibid. Para 20.

<sup>5</sup> Ibid. Para 21.





*No one shall be subjected to pressure to conceal, suppress, or deny their sexual orientation or gender identity<sup>6</sup>*

In addition, Argentina and Malta are widely recognized as two countries that have introduced gender recognition laws that are based on international human rights standards and place gender recognition within the context of transgender people's human rights more broadly. Both countries affirm the right of transgender people to self-determination and deliberately do not restrict eligibility for gender recognition on discriminatory or abusive grounds. They explicitly ensure that legal gender recognition is not dependent on any form of medical diagnosis or gender-affirming health interventions, such as surgeries or hormonal treatment. In both Argentina and Malta, there are no age or other restrictions on who can access the provisions and there are additional protections for children. Laws in both countries have a broad focus on transgender people's human rights and the application of gender recognition to other areas of life. Both countries have addressed transgender people's rights to health, privacy, and protection from discrimination.<sup>7</sup>

This means that the current legal gender recognition procedures and practices in Nepal fall short to fulfill the obligations under the international human rights principles and treaties and doesn't correspond with the international good practices, because there is still no option provided for trans women to be recognized as female or trans men to be recognized as male. In another word, the right to self-determination of trans women who self-identify as women, and trans men who self-identify as men, are deprived.

### **Legal gender recognition and access to other rights**

According to Asia Pacific Transgender Network, Legal gender recognition is not about giving only transgender people the choice to no longer be legally defined by their sex assigned at birth, but also legal protections based on their gender identity and expression, as well as the ability to navigate the daily life.<sup>8</sup> The United Nations Independent Expert on Sexual Orientation and Gender Identity also stated that

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<sup>6</sup> Yogyakarta Principles, princ. 3.

<sup>7</sup> Asia Pacific Transgender Network, Legal Gender Recognition: A Multi-Country Legal and Policy Review in Asia, 2017, <https://weareaptn.org/resource/legal-gender-recognition-a-multi-country-legal-and-policy-review-in-asia/>

<sup>8</sup> Ibid.



*'The right to equal recognition before the law is also a central tenet for other rights and freedoms. In practice, it is connected to entitlements in relation to health, education, housing, access to social security and employment insofar as the actualization by the State bureaucracy of all of these entitlements depends on the identification of the individual'<sup>9</sup>*

This can imply that legal gender recognition procedures and practices should strengthen, and not undermine the access to the rights. As a result, the Nepali government is obligated to address the incoherence and inconsistency of the legal gender recognition procedure, and the discrepancies between Ms. Kapali names and gender markers in the ID and educational records and documents that prevent Ms. Kapali from the full access to right to education. Moreover, the government should take the necessary and immediate steps to ensure Ms. Kapali the full enjoyment of the right to education.

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<sup>9</sup> See above 3. Para 22.